

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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DANIEL S. PORTER,

Case No. 3:22-cv-00089-MMD-CLB

Petitioner,

ORDER

v.

GARRETT, *et al.*,

Respondents.

Petitioner Daniel S. Porter, a Nevada prisoner, has filed a counseled Third-Amended Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254. (ECF No. 27 (“Third-Amended Petition”).) Currently before the Court is Respondents’ motion to dismiss the Third-Amended Petition. (ECF No. 41 (“Motion”).) Porter opposed the Motion, and Respondents replied. (ECF Nos. 47, 51.) For the reasons discussed below, the Court grants the Motion, in part.

**I. BACKGROUND**

A jury found Porter guilty of three counts of sexual assault with the use of a deadly weapon, battery with the intent to commit sexual assault with the use of a deadly weapon, first-degree kidnapping with the use of a deadly weapon, and robbery with the use of a deadly weapon. (ECF No. 10-9.) Porter was sentenced to an aggregate total of life in prison with parole eligibility after a minimum of 62 years. (*Id.*) Porter appealed, and the Nevada Court of Appeals affirmed on April 28, 2017. (ECF No. 10-15.)

On December 19, 2017, Porter petitioned the state court for post-conviction relief. (ECF No. 10-17.) The state court denied Porter’s petition. (ECF No. 10-21.) Porter appealed, and the Nevada Supreme Court affirmed on November 10, 2021. (ECF No. 10-26.)

Porter commenced this federal habeas action on or about February 14, 2022. (ECF No. 1.) This Court granted Porter's motion for the appointment of counsel and appointed the Federal Public Defender to represent Porter. (ECF Nos. 5, 12.) Porter filed a counseled First-Amended Petition, counseled Second-Amended Petition, and counseled Third-Amended Petition. (ECF Nos. 13, 14, 27.) Porter raises the following grounds for relief in his Third-Amended Petition:

- 1.1 His trial counsel failed to investigate.
- 1.2 His trial counsel failed to cross-examine witnesses.
2. The trial court failed to grant a continuance for further DNA analysis.
3. The evidence was insufficient to support his convictions.
- 4.1 His trial counsel failed to investigate and properly prepare for trial.
- 4.2 His trial counsel failed to object to multiple instances of prosecutorial misconduct during closing arguments.
- 4.3 His trial counsel failed to object to portions of the expert's testimony.
5. His appellate counsel was ineffective.
6. The prosecution committed prosecutorial misconduct during closing arguments.
7. There were cumulative errors raised on state post-conviction.
8. His sentence violated his right to be free from cruel and unusual punishment.

(ECF No. 27.)

## II. LEGAL STANDARDS & ANALYSIS

Respondents argue that (1) any claims in the Third-Amended Petition that do not relate back to a timely petition must be dismissed as untimely; (2) Porter failed to develop the factual basis for ground 1.1; (3) grounds 1, 6, and 7 are unexhausted; (4) all technically exhausted grounds should be dismissed as procedurally defaulted; (5) grounds 1.2 and 4.2 are not cognizable; and (6) grounds 1.1 and 4.1 are duplicative. (ECF No. 41.) The Court will address these arguments in turn.

### A. Timeliness

Respondents argue that Porter's Third-Amended Petition is untimely and because ground 1.1 does not relate back to his timely original petition or his timely Second-Amended Petition and must be dismissed. (ECF No. 41 at 5–6.)

A new claim in an amended petition that is filed after the expiration of the Antiterrorism and Effective Death Penalty Act one-year limitation period will be timely only

1 if the new claim relates back to a claim in a timely-filed pleading on the basis that the  
2 claim arises out of “the same conduct, transaction or occurrence” as a claim in the timely  
3 pleading. *Mayle v. Felix*, 545 U.S. 644 (2005). In *Mayle*, the United States Supreme Court  
4 held that habeas claims in an amended petition do not arise out of “the same conduct,  
5 transaction or occurrence” as claims in the original petition merely because the claims all  
6 challenge the same trial, conviction, or sentence. *Id.* at 655-64. Rather, habeas claims  
7 asserted in an amended petition relate back “only when the claims added by amendment  
8 arise from the same core facts as the timely filed claims, and not when the new claims  
9 depend upon events separate in ‘both time and type’ from the originally raised episodes.”  
10 *Id.* at 657. In this regard, the reviewing court looks to “the existence of a common ‘core of  
11 operative facts’ uniting the original and newly asserted claims.” *Id.* at 659.

12 Ground 1.1 in Porter’s timely Second-Amended Petition asserted that his trial  
13 counsel was ineffective for failing to investigate. (ECF No. 14 at 27-34.) Specifically,  
14 Porter alleged that his attorney failed to investigate the DNA evidence in the case. (*Id.*)  
15 The only difference between ground 1.1 in the Second-Amended Petition and ground 1.1  
16 in the Third-Amended Petition is that the Third-Amended Petition includes details from  
17 Porter’s DNA expert. (ECF No. 27 at 31-36.) The addition of this factual support does not  
18 mean that ground 1.1 of the Second-Amended Petition and ground 1.1 of the Third-  
19 Amended Petition do not share a common core of operative facts. See *Mayle*, 545 U.S.  
20 at 659. Indeed, the operative fact remains the same: Porter’s trial counsel was ineffective  
21 in investigating the DNA evidence. As such, the Court finds that ground 1.1 of the Third-  
22 Amended Petition relates back and is timely.

23 Relatedly, Respondents argue that Porter failed to develop the factual basis for  
24 ground 1.1, so this Court should dismiss ground 1.1 or strike the new evidence. (ECF No.  
25 41 at 11.) The new evidence is Porter’s report from the DNA expert, which was not part  
26 of the state court record. Porter rebuts that this Court can consider this new evidence  
27 because he attempted to develop it in the state court but was denied. (ECF No. 47 at 10.)  
28 The Court will not dismiss the entirety of ground 1.1 and defers ruling on the request to

1 strike this new evidence until the time of merits review given that the Court has found, as  
 2 is outlined below, that ground 1.1 is unexhausted.

### 3 **B. Exhaustion**

4 Respondents argue that grounds 1.1, 1.2, 6, and 7 are unexhausted. (ECF No. 41  
 5 at 7.) A state prisoner must exhaust state court remedies on a habeas claim before  
 6 presenting that claim to the federal courts. See 28 U.S.C. § 2254(b)(1)(A). This exhaustion  
 7 requirement ensures that the state courts, as a matter of comity, will have the first  
 8 opportunity to address and correct alleged violations of federal constitutional  
 9 guarantees. See *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991). “A petitioner has  
 10 exhausted his federal claims when he has fully and fairly presented them to the state  
 11 courts.” *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014). To present a claim fully  
 12 and fairly, a petitioner must present the substance of his claim to the state courts, and the  
 13 claim presented to the state courts must be the substantial equivalent of the claim  
 14 presented to the federal court. See *Picard v. Connor*, 404 U.S. 270, 278 (1971). The state  
 15 courts have been afforded a sufficient opportunity to hear an issue when a petitioner has  
 16 presented the state court with the issue’s factual and legal basis. See *Weaver v.*  
 17 *Thompson*, 197 F.3d 359, 364 (9th Cir. 1999). A petitioner may reformulate his claims so  
 18 long as the substance of his argument remains the same. *Picard*, 404 U.S. at 277-78.

#### 19 **1. Ground 1.1**

20 As a reminder, in ground 1.1, Porter alleges that his trial counsel was ineffective  
 21 for failing to investigate the DNA evidence. (ECF No. 27 at 31.) Porter argues that this  
 22 ground is exhausted because he attempted to raise it before the state court, and even  
 23 though the state court denied his request to hire a DNA expert to support this ground, he  
 24 appealed that denial to the Nevada appellate courts. (ECF No. 47 at 15-16.) The Court  
 25 disagrees. In his appeal to the Nevada Supreme Court, “Porter argue[d] that counsel  
 26 should have further investigated and challenged the DNA evidence by retaining a defense  
 27 expert.” (ECF No. 10-26 at 3.) However, importantly, the Nevada Supreme Court denied  
 28 this claim, in part, because “Porter does not argue, nor has he alleged sufficient facts to

1 demonstrate, that independent expert testing would have yielded different results.” (*Id.*)  
2 The addition of the DNA expert’s report in ground 1.1 warrants a finding that ground 1.1  
3 is unexhausted. *See Dickens v. Ryan*, 740 F.3d 1302, 1318 (9th Cir. 2014) (“A claim has  
4 not been fairly presented in state court if new factual allegations either fundamentally alter  
5 the legal claim already considered by the state courts, or place the case in a significantly  
6 different and stronger evidentiary posture than it was when the state courts considered  
7 it.”).

## 8                   **2.       Ground 1.2**

9           In ground 1.2, Porter alleges that his trial counsel failed to cross-examine  
10 witnesses. (ECF No. 27 at 36.) Porter acknowledges that ground 1.2 is unexhausted.  
11 (ECF No. 47 at 21.) However, Porter asserts that ground 1.2 is technically exhausted and  
12 procedurally defaulted and that he can overcome the procedural default under *Martinez*  
13 *v. Ryan*, , 566 U.S. 1 (2012). (*Id.* at 22.)

14           A claim may be considered procedurally defaulted if “it is clear that the state court  
15 would hold the claim procedurally barred.” *Sandgathe v. Maass*, 314 F.3d 371, 376 (9th  
16 Cir. 2002). Porter would face several procedural bars if he were to return to state court.  
17 *See, e.g.*, NRS §§ 34.726, 34.810. Nevada has cause-and-prejudice and fundamental  
18 miscarriage of justice exceptions to its procedural bars, which are substantially the same  
19 as the federal standards. If a petitioner has a potentially viable cause-and-prejudice or  
20 actual-innocence argument under the substantially similar federal and state standards,  
21 then they cannot establish that “it is clear that the state court would hold the claim  
22 procedurally barred.” *Sandgathe*, 314 F.3d at 376. For that reason, the courts in this  
23 district have generally declined to find a claim subject to anticipatory procedural default  
24 unless the petitioner represents that he would be unable to establish cause and prejudice  
25 in a return to state court. In such a case, the claim would generally be subject to  
26 immediate dismissal as procedurally defaulted, as the petitioner would have conceded  
27 that he has no grounds for exception to the procedural default in federal court.

1 A different situation is presented, however, where the Nevada state courts do not  
2 recognize a potential basis to overcome the procedural default arising from the violation  
3 of a state procedural rule that is recognized under federal law. In *Martinez*, the Supreme  
4 Court held that the absence or inadequate assistance of counsel in an initial-review  
5 collateral proceeding may be relied upon to establish cause excusing the procedural  
6 default of a claim of ineffective assistance of trial counsel. See *id.* at 9. The Nevada  
7 Supreme Court does not recognize *Martinez* as cause to overcome a state procedural  
8 bar under Nevada state law. See *Brown v. McDaniel*, 331 P.3d 867, 875 (Nev. 2014).  
9 Thus, a Nevada habeas petitioner who relies upon *Martinez*—and only *Martinez*—as a  
10 basis for overcoming a state procedural bar on an unexhausted claim can successfully  
11 argue that the state courts would hold the claim procedurally barred but that he  
12 nonetheless has a potentially viable cause-and-prejudice argument under federal law that  
13 would not be recognized by the state courts when applying the state procedural bars.

14 Here, Porter advances only *Martinez* as a basis for excusing the anticipatory  
15 default of ground 1.2. Accordingly, the Court considers ground 1.2 to be technically  
16 exhausted and procedurally defaulted. Because the analysis of cause and prejudice to  
17 overcome the procedural default of ground 1.2 is necessarily intertwined with the merits  
18 of ground 1.2, the Court defers a determination of whether Porter can overcome the  
19 procedural default of ground 1.2 until the time of merits determination.

### 20 3. Ground 6

21 In ground 6, Porter alleges that the state committed prosecutorial misconduct  
22 during closing arguments. (ECF No. 27 at 67.) Respondents contend that Porter only  
23 presented a related claim of ineffective assistance of counsel for counsel's failure to  
24 object to the instances of prosecutorial misconduct, but he did not present the underlying  
25 claim of prosecutorial misconduct. (ECF No. 41 at 10.) Porter rebuts that he presented  
26 both an ineffective assistance of counsel claim for failing to object to several instances of  
27 prosecutorial misconduct *and* the underlying prosecutorial misconduct claims. (ECF No.  
28 47 at 18.) Although Porter argued the facts of the underlying prosecutorial misconduct

1 claims to support his argument that his trial counsel was ineffective for failing to object,  
2 this fails to exhaust the underlying prosecutorial misconduct claim. See *Rose v.*  
3 *Palmateer*, 395 F.3d 1108, 1112 (9th Cir. 2005) (“Here, although Rose’s Fifth Amendment  
4 claim is related to his claim of ineffective assistance, he did not fairly present the Fifth  
5 Amendment claim to the state courts when he merely discussed it as one of several  
6 issues which were handled ineffectively by his trial and appellate counsel. While  
7 admittedly related, they are distinct claims with separate elements of proof, and each  
8 claim should have been separately and specifically presented to the state courts.”).  
9 Ground 6 is unexhausted.

#### 10 **4. Ground 7**

11 In ground 7, Porter alleges that the cumulative errors raised in his state post-  
12 conviction petition—in other words, grounds 4, 5, and 6 of his instant Third-Amended  
13 Petition—prejudiced him. (ECF No. 27 at 68.) However, Porter then confusingly states  
14 that “[t]he errors set forth in Claims 3 and 5 [of his Third-Amended Petition] implicate  
15 important federal constitutional rights.” (*Id.*) Respondents argue that (1) Porter presented  
16 a cumulative error claim in his state postconviction appeal, but ground 3 of his Third-  
17 Amended Petition was not a part of that cumulative error claim, and (2) because ground  
18 6 is unexhausted, ground 7’s inclusion of ground 6 renders ground 7 unexhausted. (ECF  
19 No. 41 at 10.) Porter clarifies that his Third-Amended Petition contained a typographical  
20 error and that he meant to include grounds 4, 5, and 6 of his Third-Amended Petition  
21 within his cumulative error claim. (ECF No. 47 at 19.) Turning to Respondents’ latter  
22 argument, to the extent that ground 7 incorporates ground 6, it is unexhausted.

#### 23 **C. Cognizable Claims**

24 Respondents argue that grounds 1.2, 4.2, and 7 are not cognizable in federal  
25 habeas. (ECF No. 41 at 12.) Specifically, Respondents argue that grounds 1.2 and 4.2  
26 contain allegations about the cumulative effect of Porter’s counsel’s errors establishing  
27 prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), and ground 7 alleges  
28 cumulative error in his post-conviction proceedings, but according to Respondents,

1 cumulative error claims are not cognizable because circuit courts disagree on whether  
2 cumulative error is a basis for federal habeas relief. (*Id.* at 13.)

3 When conducting habeas review, a federal court is limited to deciding whether a  
4 conviction violates the Constitution, laws, or treaties of the United States. See 28 U.S.C.  
5 § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Unless an issue of federal  
6 constitutional or statutory law is implicated by the facts presented, the claim is not  
7 cognizable in federal habeas. See *McGuire*, 502 U.S. at 68. Because United States  
8 Supreme Court precedent has clearly established the cumulative error doctrine, grounds  
9 1.2, 4.2, and 7 are cognizable. See *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007)  
10 (“The Supreme Court has clearly established that the combined effect of multiple trial  
11 court errors violates due process where it renders the resulting criminal trial fundamentally  
12 unfair.”).

#### 13 **D. Duplicative Claims**

14 Respondents argue that ground 1.1 and 4.1<sup>1</sup> are duplicative, with the primary  
15 distinction being the new evidence that he added to ground 1.1. (ECF No. 41 at 15.) Porter  
16 did not respond to this argument. (ECF No. 47.) Given that the Court has determined that  
17 ground 1.1 is unexhausted, it defers ruling on this argument until after Porter has elected  
18 how to he wishes to proceed on ground 1.1.

#### 19 **E. Mixed Petition**

20 A federal court may not entertain a habeas petition unless the petitioner has  
21 exhausted all available and adequate state court remedies for all claims in the petition.  
22 See *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A “mixed petition” containing both  
23 exhausted and unexhausted claims is subject to dismissal. *Id.* Because Porter’s Third-  
24 Amended Petition is mixed, he has three options: (1) file a motion to dismiss seeking  
25 partial dismissal of only the unexhausted claim(s); (2) file a motion to dismiss the entire

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26 <sup>1</sup>Respondents argue that the Court should dismiss ground 4.1 to the extent that it  
27 asserts state court error for failing to hold an evidentiary hearing. (ECF No. 41 at 14.)  
28 However, after Porter clarified that he has not attempted to raise a claim related to the  
state court’s failure to hold an evidentiary hearing, Respondents withdrew this argument.  
(ECF No. 51 at 6.)




1 petition without prejudice in order to return to state court to exhaust the unexhausted  
2 claim(s); and/or (3) file a motion for other appropriate relief, such as a motion for a stay  
3 and abeyance asking the Court to hold his exhausted claim(s) in abeyance while he  
4 returns to state court to exhaust the unexhausted claim(s).

5 **III. CONCLUSION**

6 It is therefore ordered that Respondents' motion to dismiss (ECF No. 41) is granted  
7 as follows: (1) grounds 1.1, 6, and a portion of 7 are unexhausted, and (2) ground 1.2 is  
8 technically exhausted and procedurally defaulted, although consideration of whether  
9 Porter can demonstrate cause and prejudice under *Martinez* to overcome the procedural  
10 default of ground 1.2 is deferred until after the filing of an answer and reply in this action.

11 It is further ordered that Porter has 30 days from the date of this order to inform  
12 the Court how he wishes to proceed with his mixed petition as outlined in this order. If  
13 Porter chooses to file a motion for a stay and abeyance or seek other appropriate relief,  
14 the Respondents may respond according to Local Rule 7-2.

15 DATED THIS 3<sup>rd</sup> day of September 2024.

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19 MIRANDA M. DU  
20 CHIEF UNITED STATES DISTRICT JUDGE  
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